No. 92-602

In the Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER, ET AL., PETITIONERS

v.

MELVIN HICKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether the plaintiff in an employment discrimination case under Title VII of the Civil Rights Act of 1964 or 42 U.S.C. 1983 is entitled to judgment as a matter of law once he has (i) established a prima facie case and (ii) proved that all permissible grounds advanced by the defendant in support of its actions are unworthy of credence.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the method by which a plaintiff may prove intentional employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1983. The Attorney General and the Equal Employment Opportunity Commission (EEOC) share substantial responsibility for the enforcement of Title VII. The EEOC also has primary responsibility for interpretation and enforcement of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, and

the courts have applied the same order and standards of proof to claims of age discrimination under the ADEA. See, *e.g.*, *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983). The resolution of this case will directly affect the government's discharge of these responsibilities. The EEOC participated as amicus curiae in support of respondent in the court of appeals, and the United States has previously participated in cases in this Court involving similar issues, including *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), as well as in numerous other cases under Title VII and the ADEA.

STATEMENT

1. Respondent Melvin Hicks began work in August 1978 as a correctional officer at petitioner St. Mary's Honor Center, a minimum security state prison in St. Louis, Missouri. Pet. App. A2, A28. In February 1980 he was promoted to shift commander, a supervisory position. *Id.* at A2. Prior to the events at issue in this case, respondent had never been suspended, "written up," or otherwise subjected to any disciplinary action. *Id.* at A3.

In January 1984 the superintendent of St. Mary's, Arthur Schulte, was demoted and transferred to another institution in response to complaints about management of the prison. Pet. App. A15. He was replaced by petitioner Steven Long. *Ibid.* Both Schulte and Long are white. *Id.* at A2, A15 n.1. At the same time, the chief of custody and two shift commanders, all of whom were black, were removed

and replaced by white employees.[1] *Id.* at A15 & nn.1, 3. John Powell became chief of custody and respondent's immediate supervisor. *Id.* at A2. Re-spondent and another black shift commander were initially retained as part of the new administration.

In March 1984, respondent was suspended for five days after an incident in which other officers arriving at St. Mary's during respondent's late-night shift discovered that the front-door officer and another guard were away from their posts, the "control center" officer was required to leave his post momentarily to open the door, and the first floor lights were turned off. None of the officers directly involved was disciplined. Powell testified at trial that it was his policy to discipline only the shift commander for violations occurring during his shift.[2] Pet. App. A16-A17.

Two weeks later, respondent properly authorized use of a St. Mary's vehicle by two officers. Those two officers and the control center officer all failed to enter the use of the vehicle in an official log, as required by prison rules. The disciplinary review board recommended that respondent be demoted from shift commander to correctional officer for that failure. Powell, who was a member of the review board, voted to terminate respondent. Again, none of

[1] The position of chief of custody was first offered to a black employee, who declined the offer. Pet. App. A15 n.2.

[2] Powell was responsible for initiating disciplinary proceedings. A four-person disciplinary review board would then make a recommendation to the superintendent of St. Mary's, who would in turn make a recommendation to the director of the state prison administration. See Pet. App. A17 n.6.

the other individuals involved was disciplined. Shortly after this incident, but before his demotion, respondent was reprimanded for failing to investigate an inmate fight, although he had given Powell a memorandum about the incident and ordered a subordinate to submit a report. Pet. App. A17-A18 & n.7.

When respondent was informed of his demotion, he asked for and was given the rest of the day off. As respondent was leaving the meeting, Powell followed and ordered him to open his locker so that Powell could retrieve respondent's copy of the shift commander's manual. Respondent refused, and indicated in the ensuing confrontation that he would "step outside" with Powell. Powell sought disciplinary action against respondent based on the "threats" made during this confrontation, and a disciplinary board recommended that respondent be suspended for three days. Superintendent Long instead recommended that respondent be fired, based on the "severity and accumulation" of his violations. Respondent was fired on June 7, 1984. Pet. App. A18-A19.

2. Respondent then commenced this action, alleging that petitioners had demoted and fired him because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1983.[3] Pet. App. A14. Petitioners defended

[3] Respondent sued St. Mary's under Title VII and Long under 42 U.S.C. 1983. Because the issues and standards are not materially different, we will refer only to Title VII. See Pet. App. A6-A7 (and cases cited); cf. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 186 (1989) (framework of proof developed under Title VII applies to cases under 42 U.S.C. 1981).

on the ground that "the severity and the accumulation of violations committed" by respondent supplied legitimate, nondiscriminatory reasons for demoting and firing him. *Id.* at A23; see Pet. Br. 8.

a. Respondent introduced evidence intended to show that the reasons petitioners offered for their actions were unworthy of credence. With respect to the five-day suspension in March, respondent showed that on two occasions that same month he had reported that no front-door officer was present when he arrived at St. Mary's during the shift commanded by officer Sharon Hefele, who is white. The control center officer stated that Officer Hefele had ordered him to open and close the front door, which required him to leave his assigned post. Despite the close similarity between those incidents and the one for which respondent was suspended, no one was ever disciplined for those incidents. Pet. App. A19-A20, A24-A25.

Similarly, respondent had reported on another occasion that during Officer Hefele's shift the doors to the main power room and the annex building were unlocked, in violation of regulations, yet the prison administration took no action. A white officer who took a set of prison keys home with him was never disciplined. And a white officer who admitted that, as an acting shift commander, he had actually allowed an inmate to escape received only a letter of reprimand.[4] Pet. App. A20, A25-A26.

[4] The district court noted that so far as appeared from the record, that reprimand was the only discipline meted out to any officer other than respondent during the period at issue in this case. Pet. App. A27. Apparently, the only dispute among

The incident that resulted in respondent's March suspension was reported by a white officer, Ed Ratliff. Pet. App. A16, A19 n.8. On the day of that incident, Ratliff permitted an unescorted inmate to climb into the prison superintendent's office to retrieve some work passes locked inside. When respondent brought this incident, which the district court termed a "striking and obvious breach of security," to Powell's attention, Powell took no disciplinary action, but commended Ratliff for "defusing a volatile situation." *Id.* at A19 & nn.9-10, A25. On another occasion, Ratliff brought his brother, a deputy marshal, to St. Mary's, and directly countermanded respondent's instruction that the brother check his gun while inside the prison. Although respondent reported the incident, Powell refused to recommend discipline against Ratliff. *Id.* at A19.

Finally, ten days before respondent's confrontation with Powell, respondent had reported to Powell that a white subordinate had become indignant at receiving a low service rating and had cursed respondent with "highly profane language." Pet. App. A20. Powell concluded that the subordinate was "merely venting justifiable frustration," and took no action. *Id.* at A20-A21 & n.14, A26 n.17.

b. After reviewing the evidence, the district court first found that respondent had proved a prima facie case of race discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), by showing

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prison administrators with respect to the escape incident was whether the letter of reprimand should remain in the responsible officer's file permanently, or be removed after six months. *Id.* at A25 n.16.

that he was a member of a protected class, that he had the necessary job qualifications for the position of shift commander, that he had a satisfactory record in that position until the change of administration at St. Mary's, and that after he was demoted the position of shift commander remained open and was then filled by a white employee. Pet. App. A22-A23. The district court further found that petitioners had carried their burden of production at the second stage of the *McDonnell Douglas* framework by articulating non-discriminatory reasons for their actions—namely, the severity and accumulation of violations committed by petitioner. *Id.* at A23.

Finally, the district court found, at the third stage of the *McDonnell Douglas* framework, that respondent had "carried his burden in proving that the reasons given for his demotion and termination were pretextual." Pet. App. A26; see *id.* at A23-A26. The court observed that respondent was "mysteriously the only person disciplined for violations actually committed by his subordinates," *id.* at A23-A24, noting that a white shift commander was never disciplined for similar or more serious infractions occurring on her shift. *Id.* at A24-A25. Although Superintendent Long had testified, "rather sheepishly," that he considered the vehicle log incident "a serious violation for which harsh discipline was justified," the court found that contention unconvincing in light of the fact that "much more serious violations, when committed by [respondent's] co-workers, were either disregarded or treated much more leniently." *Id.* at A25. Finally, the court found that respondent had been "provoked" into the final confrontation with Powell, and that "the evidence

suggests that Powell manufactured the confrontation * * * in order to terminate plaintiff." *Id.* at A26.

Although respondent had proved that the only reasons advanced by petitioners were pretextual, the district court nevertheless entered judgment for petitioner. Pet. App. A27-A30. The court was of the view that even after demonstrating that petitioners' reasons were not worthy of credence, respondent "still [bore] the ultimate burden to prove that race was the determining factor in [petitioners'] decision," *id.* at A26, and it concluded that respondent had not proved that the actions taken against him were "racially rather than personally motivated," *id.* at A27.

The court pointed to no specific evidence in the record that Powell, Long or other prison administrators harbored any personal animosity against respondent, independent of his race. It did note that no action was taken against black subordinates who had actually committed two of the violations for which respondent was disciplined, and that there were black members of the disciplinary review boards convened to consider respondent's violations. *Id.* at A27-A28. The court also concluded that neither the general pattern of personnel changes at St. Mary's nor the reduction in the number of blacks in supervisory positions raised an inference of racial discrimination, and that neither Long nor Powell had been aware, prior to the 1984 personnel changes, of a 1981 study that had concluded that "blacks possessed too much power at St. Mary's."[5] *Id.* at A27-A28.

[5] The district court described the study as "a comprehensive comparison of [the honor centers in St. Louis and Kansas City,] which discussed the shortfalls and suggested means of improvement. In a section toward the end of the study [the author] pointed out that too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real. No witness for the defendants admitted he was aware of [this] study at the time of the 1984 personnel changes." Pet. App. A21. See PX 1.

3. The court of appeals reversed and ordered entry of judgment for respondent. Pet. App. A1-A12. It reasoned that the district court's "unequivocal factual finding" that petitioners' asserted reasons for their actions were pretextual, *id.* at A11, left petitioners "in a position of having offered no legitimate reason for their actions," and "in no better position than if they had remained silent" in the face of respondent's prima facie case, *id.* at A10. "Once [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual," the court held, "[respondent] was entitled to judgment as a matter of law," without any need for further evidence of discrimination. *Id.* at A10-A11. Thus, the court concluded, it was improper for the district court to have rejected respondent's claim by "assum[ing]—without evidence to support the assumption—that [petitioners'] actions were somehow 'personally motivated.'" *Id.* at A10.

SUMMARY OF ARGUMENT

Respondent alleged that he was demoted and discharged by petitioners because of his race, and the case proceeded under the familiar burden-shifting framework prescribed by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and

subsequent decisions. First, the plaintiff must establish a prima facie case. That initial showing creates a rebuttable but otherwise legally mandatory presumption: if the employer remains silent in the face of the prima facie case, the court must enter judgment for the plaintiff. In order to avoid that result, the employer is required to articulate some clear and reasonably specific nondiscriminatory reason for the challenged employment action. Finally, the plaintiff bears the burden of proving that the reason advanced by the employer was not its true reason, but was merely a pretext for discrimination. This Court has said that that burden "merges" with the plaintiff's ultimate burden of proving illegal discrimination, which may be carried either directly through proof of a discriminatory motive, or indirectly by showing that the employer's proffered explanation is unworthy of credence.

In this case, there is no dispute that respondent made out a prima facie case. Petitioners responded by articulating a facially legitimate reason for demoting and firing respondent: the "severity and accumulation" of his violations of prison rules. The district court found that respondent then carried his final burden of showing that petitioners' proffered reason for their actions was unworthy of belief. The court nevertheless went on to hold that respondent was not entitled to judgment because he had not adduced some further evidence that petitioners' actions were motivated by his race.

As the court of appeals held, that conclusion is inconsistent with this Court's prior decisions. The question is not whether a plaintiff must prove intentional discrimination, which is undisputed, but

how he may prove it. This Court has consistently explained that a plaintiff may carry his ultimate burden indirectly, by discrediting the employer's proffered explanation for its actions. Moreover, a contrary holding would be inconsistent with the premise that an employer that is unable or unwilling to articulate a credible nondiscriminatory reason for a challenged action is more likely than not concealing a discriminatory reason. An employer that remained silent in the face of the plaintiff's prima facie case would be held liable for discrimination; there is no logical justification for putting an employer that fabricates a nondiscriminatory explanation in any better position.

Petitioners argue that even if a plaintiff discredits all nondiscriminatory reasons actually advanced by the employer, the employer should be entitled to consideration by the trier of fact of the possibility that there was some other, unarticulated motivation for the employer's action. But the *McDonnell Douglas* framework of proof is designed to be a sensible and efficient means of bringing litigants and the courts to the ultimate question of discrimination. Because any number of nondiscriminatory reasons *might* have accounted for a typical employment decision, it would not be sensible or efficient to force the plaintiff to attempt to negate every possible such reason. Instead, it is reasonable to require the employer, which is of course in the best position to know its true reasons for acting, to frame specific issues for response by the plaintiff and decision by the court.

Finally, petitioners argue that judgment for the plaintiff should not be compelled where legitimate reasons for the employer's actions, while not articu-

lated by the employer itself, "emerge" from the plaintiff's case or are "suggested" by the employer's other evidence. That argument has little to do with the facts of this case. A fair reading of the district court's opinion reveals at most a wholly unsupported—and therefore clearly erroneous—"assumption" that respondent was actually fired because of personal animosity (unrelated to race) on the part of John Powell, his immediate supervisor. Even persuasive evidence of Powell's "personal" animosity would hardly be conclusive, because final decisions affecting respondent's employment were made not by Powell, but by others in the prison administration. In any event, however, petitioners can point to nothing in the record to indicate that Powell's obvious hostility toward respondent was based on anything other than respondent's race.

ARGUMENT

RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE BASIS OF HIS PRIMA FACIE CASE AND PROOF THAT ALL NONDISCRIMINATORY REASONS PROFFERED BY PETITIONERS TO JUSTIFY THEIR ACTIONS WERE UNWORTHY OF CREDENCE

A. Requiring Respondent To Do More Than Discredit All Nondiscriminatory Explanations Proffered By Petitioners Would Be Inconsistent With The Order Of Proof Established By *McDonnell Douglas* And Subsequent Cases

Respondent alleged that he was demoted and discharged by petitioners because of his race. In a series of cases beginning with *McDonnell Douglas*

Corp. v. *Green*, 411 U.S. 792 (1973), this Court has set forth the "allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252 (1981). The applicable three-step procedural framework has become familiar:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-253 (quoting *McDonnell Douglas*, 411 U.S. at 802).

There is no dispute that respondent proved a prima facie case. See Pet. App. A8 & n.7. That threshhold showing "eliminates the most common nondiscriminatory reasons" for the challenged employment action: the plaintiff's lack of qualifications, or the employer's lack of an available position. See *Burdine*, 450 U.S. at 253-254 & n.6; *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). It therefore creates a "legally mandatory," although rebuttable, presumption: if the employer remains silent in the face of the plaintiff's initial

showing, then "the court must enter judgment for the plaintiff." *Burdine*, 450 U.S. at 254 & n.7.

Establishment of a prima facie case requires the employer to "clearly set forth, through the introduction of admissible evidence, the reasons" for its challenged actions. *Burdine*, 450 U.S. at 255. The employer does not bear the burden of *proving* that it was motivated by the legitimate reasons it identifies, and therefore did not discriminate. The employer need only articulate a nondiscriminatory explanation for its actions, supported by sufficient evidence to permit acceptance of that explanation by a rational trier of fact. *Id.* at 255, 257. In this case, petitioners articulated a facially legitimate reason for demoting and firing respondent: the "severity and accumulation" of his violations of prison administration rules. Pet. App. A8; Pet. Br. 8.

Once the employer has articulated a nondiscriminatory explanation for its actions, the plaintiff is accorded "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. The burden of proof on that issue rests with the plaintiff, and "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Ibid.* This Court made clear in *Burdine* that the plaintiff may carry that ultimate burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Ibid.*

The district court in this case found that respondent had carried his burden at the third stage of the

McDonnell Douglas framework "indirectly," by discrediting the only nondiscriminatory explanation proffered by petitioners for their actions. Pet. App. A23-A26. The district court nevertheless went on to hold that respondent was not entitled to judgment, because he had not adduced some further evidence that petitioners' actions were motivated by his race. *Id.* at A27-A29. As the court of appeals correctly concluded, *id.* at A11-A12, that holding is inconsistent with this Court's statement in *Burdine* that a Title VII plaintiff may carry his ultimate burden "by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.

Relying in part on this Court's later decision in *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), petitioners argue that the courts should focus on "the ultimate question of discrimination," rather than the details of the *McDonnell Douglas* evidentiary framework.[6] Pet. Br.

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[6] Petitioners rely (Pet. Br. 14, 25-26) on language in *Burdine* stating that the presumption of discriminatory motive raised by the plaintiff's prima facie case "drops from the case" once the employer articulates a nondiscriminatory reason for its actions. 450 U.S. at 255 & n.10. The Court made that passing comment, however, in the course of explaining that although the employer's showing "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence," that initial evidence "and inferences properly drawn therefrom" remain very much part of the case. *Id.* at 255 n.10. The Court noted, for example, that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Ibid.* To be sure, once the employer has carried its burden of production, the plaintiff's mere introduction of evidence to rebut the employer's

15; see also *id.* at 13-16, 25-26. We agree with petitioners that "intentional discrimination is the key factual issue in an employment discrimination case." *Id.* at 26. But that statement of the issue begs the crucial question of *how the plaintiff may prove* "intentional discrimination." As explained above, the Court answered that question squarely in *Burdine*: the plaintiff may make the required showing either through direct evidence of a discriminatory motive, *or* by showing that the employer's proffered explanations are pretextual. Far from altering or undercutting that disjunctive standard of proof, *Aikens* reiterated it *in haec verba*.[7] *Aikens*, 460 U.S. at 716; see also *id.* at 717-718 (Blackmun, J., concurring) ("the *McDonnell Douglas* framework requires that a plaintiff prevail when * * * he demonstrates that the

explanation does not, in itself, resuscitate a "legally mandatory inference" of discrimination. But where, as in this case, the plaintiff has succeeded in *proving* "that the employer's proffered explanation is unworthy of credence," he has carried a burden which, as the Court specifically observed, "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Id.* at 256.

[7] In light of this Court's specific and repeated articulation of this standard of proof in cases directly addressing the issue, we find inexplicable petitioners' attempted reliance on *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289-290 (1982). *Pullman-Standard* held that a factual finding that a particular seniority system was not adopted with discriminatory intent was reviewable only for clear error, and rejected the notion that in that context discriminatory intent could be inferred from evidence of disparate impact. Nothing in the decision suggests that it implicates, let alone undercuts, anything that the Court said a year earlier in *Burdine*—and repeated a year later in *Aikens*.

legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision").

Moreover, a rule that the employer is—or even may be—entitled to judgment in its favor after the plaintiff has convinced the trier of fact that all non-discriminatory reasons put forward by the employer are unworthy of belief would be inconsistent with the premise that an employer that is unwilling or unable to articulate a credible nondiscriminatory reason for a challenged action is more likely than not concealing a discriminatory reason. See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). That logical inference, which the Court has explicitly stated compels a judgment for the plaintiff if the employer remains silent in the face of a prima facie case (*Burdine*, 450 U.S. at 254 & n.7), is no less compelling where the employer, rather than remaining silent, offers a false explanation for its actions. If anything, the inference of discrimination is stronger if the employer offers a false explanation.[8] Accordingly, as the court below held, Pet. App. A10, there is no logical justification for placing an employer that fabricates a nondiscriminatory explanation in a better position

[8] See, *e.g.*, *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988) ("As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."); *Brooks* v. *Monroe Systems for Business, Inc.*, 873 F.2d 202, 204 (8th Cir.), cert. denied, 493 U.S. 853 (1989).

than an employer that remains silent in the face of a prima facie case of discrimination.[9]

B. The *McDonnell Douglas* Order Of Proof Properly Requires The Employer To Frame The Factual Issues For Decision By Identifying The Nondiscriminatory Explanations That The Plaintiff Must Refute

For the reasons stated above, the court of appeals correctly held that once respondent discredited all of the nondiscriminatory reasons advanced by petitioners, he had satisfied his ultimate burden of persuasion under this Court's decisions and was entitled to judgment as a matter of law. Pet. App. A10-A11. Petitioners argue (Pet. Br. 21), however, that even if a plaintiff discredits all nondiscriminatory reasons actually advanced by the employer, he "[has] not necessarily eliminate[d] all lawful motives for the employment decision." They contend that such a showing entitles the plaintiff to no more than consideration by the trier of fact; and, on petitioners'

[9] A rule that the articulation of any facially legitimate reason for a challenged action, no matter how incredible given the facts of the case, ensures a defendant at least the possibility of a favorable decision from the trier of fact would also create perverse incentives for abuse of the judicial process by culpable defendants. Although perhaps muted in the context of bench trials, these incentives would become markedly more pronounced (and more costly) in the context of jury trials, such as those now available under recent statutory changes. See 42 U.S.C. 1981a(c), enacted by the Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 105 Stat. 1073 (1991). Put bluntly, it makes no sense, as a matter of law or of judicial administration, to create incentives for defendants to lie rather than settle meritorious cases.

view, the factfinder may depart entirely from the position of either party and find that the employer acted for some nondiscriminatory reason that is "contained in the record," although not identified by the employer as the true reason for its actions.[10] *Id.*

[10] The courts of appeals are divided on the question of what a plaintiff must prove to prevail in a Title VII case where there is evidence of pretext. Petitioners' position finds support in decisions of the First, Fourth, Seventh, Tenth and Eleventh Circuits which state, at least in dicta, that proof that the employer's own explanations for its actions are incredible is insufficient by itself to compel (or in some cases even to permit) judgment for the plaintiff. See, *e.g.*, *Goldman* v. *First National Bank*, No. 92-1773 (1st Cir. Feb. 18, 1993), slip op. 8 (dictum) (reviewing prior cases); *Holder* v. *City of Raleigh*, 867 F.2d 823, 827-828 (4th Cir. 1989); *Benzies* v. *Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.) (dictum), cert. denied, 483 U.S. 1006 (1987); *EEOC* v. *Flasher Co.*, No. 91-6279 (10th Cir. Dec. 29, 1992), slip op. 17-18 (dictum); *Clark* v. *Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983). Respondent's contrary position (and that of the Eighth Circuit in this case) finds support in decisions of the Second, Third, Fifth, Sixth and District of Columbia Circuits. See, *e.g.*, *Ibrahim* v. *New York State Dep't of Health*, 904 F.2d 161, 168 (2d Cir. 1990); *Chipollini* v. *Spencer Gifts, Inc.*, 814 F.2d 893, 898-900 (3d Cir.) (en banc), cert. dismissed, 483 U.S. 1052 (1987); *Thornbrough* v. *Columbus & G. R.R.*, 760 F.2d 633, 639-640, 646-647 (5th Cir. 1985); *Tye* v. *Board of Education*, 811 F.2d 315, 320 (6th Cir.), cert. denied, 484 U.S. 924 (1987); *King* v. *Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985). There are, moreover, apparent inconsistencies among decisions within several circuits. Compare, *e.g.*, *Thornbrough*, *supra*, with *Bienkowski* v. *American Airlines, Inc.*, 851 F.2d 1503, 1508 & n.6 (5th Cir. 1988); *Tye*, *supra*, with *Miller* v. *WFLI Radio Inc.*, 687 F.2d 136, 138-139 (6th Cir. 1982); *Clark*, *supra*, with *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987). See generally Lanctot, *The Defendant*

at 17. The district court in this case adopted that approach, faulting respondent for not disproving a possible explanation for petitioners' actions—personal animosity unrelated to race—that petitioners themselves had never advanced during the course of the trial. See Pet. App. A27. Any such rule would, however, seriously undermine the fair and efficient operation of the *McDonnell Douglas* framework of proof.

As this Court has explained, that framework should be viewed and applied as "a sensible, orderly way to evaluate the evidence" in an employment discrimination case. *Furnco*, 438 U.S. at 577. In that light, the probative value of proof that the reasons the employer advances are unworthy of credence arises largely because

> we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Ibid. As a theoretical matter, however, a given employment decision *might* conceivably have been justified by any number of reasons that would be

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Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hast. L.J. 57, 71-91 (1991) (collecting cases).

"legitimate" in the sense that they are not prohibited by Title VII. But it would not be sensible or orderly, or an efficient use of a trial court's or the parties' resources, to force the plaintiff to attempt to negate all possible nondiscriminatory reasons for the employer's actions—including reasons that were never even proffered by the employer itself.[11] After all, the employer is in the best position to know on what basis it acted. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. at 359 n.45. If the employer does not articulate a given reason, it is at least more likely than not that that reason did not in fact motivate the employer's action.

The Court has made clear that in a Title VII case, "the allocation of burdens * * * is intended pro-

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[11] As the Tenth Circuit said in *EEOC* v. *Flasher Co.*, No. 91-6279 (Dec. 29, 1992), slip op. 11, "[t]he articulation of a facially, nondiscriminatory reason * * * defines the parameters of the trial, as the plaintiff then knows the precise reason that he or she may try to show is only a pretext for an illegal discriminatory motive. By articulating the reasons for the plaintiff's termination, the defendant eliminates a myriad of possible reasons that would otherwise have to be addressed. That is, we require the defendant to identify and enunciate the reasons for the termination at the outset, because there is no limit to the potential number of reasons that could be raised at trial. Otherwise litigation of discrimination claims would be needlessly confused and delayed." We find it difficult to reconcile this sensible statement of the reasons for requiring the employer to "defin[e] the parameters of the trial" with the court's later observation that proof that the reason given by the employer is pretextual does not compel judgment for the plaintiff. Slip op. 17-18. In any event, the court in *Flasher* held that the legitimate reason advanced by the employer in that case was not pretextual. *Id.* at 18.

gressively to sharpen the inquiry into the elusive factual question of intentional discrimination," *Burdine*, 450 U.S. at 255 n.8, and "to bring the litigants and the court expeditiously and fairly to this ultimate question," *id.* at 253. In particular, the employer's articulation of alleged nondiscriminatory reasons for its actions is meant to move the inquiry to "a new level of specificity," and to "frame the factual issue with sufficient clarity" so that the parties—and the court—can move efficiently to the final stage of the litigation. At that stage, the plaintiff must carry his ultimate burden of proving discrimination, but he can do so either by direct proof of a discriminatory motivation, or by satisfying the trier of fact that the explanations proffered by the employer are pre-textual.[12] *Id.* at 255-256. Once the employer's stated reasons have been shown to be false, allowing the fact finder to determine (or speculate) that the employer acted with some other, unarticulated motivation would vitiate this sensible method for narrowing the issues to be addressed by the parties and decided by the court or jury.

It is true that by proving that an employer's stated reasons are not its actual reasons, a plaintiff does not necessarily rule out the possibility that the employer might have acted for some unarticulated, nondis-

[12] This Court's emphasis in *Burdine* on the fact that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific," 450 U.S. at 258, at least in part to satisfy "the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext," *ibid.*, clearly implies that the demonstration required from the plaintiff relates only to the reasons actually placed in issue by the defendant.

criminatory reason. But that is not the plaintiff's burden. The plaintiff need only show that it was more likely than not that the employer acted for a discriminatory reason. Once the plaintiff has established a prima facie case, he has, under *McDonnell Douglas*, produced sufficient evidence to give rise to a mandatory presumption to that effect. At that point, it is both fair and sensible to require the defendant employer, which is in the best position to ascertain and demonstrate the true reasons for its own personnel actions, to advance the decision-making process by stating the "clear and reasonably specific" explanation on which it intends to rely to justify its challenged action. See *Burdine*, 450 U.S. at 258. An employer that has not discriminated should always have a plausible explanation for its actions—*i.e.*, the true one, which a plaintiff will be unable to discredit. Irrational, mistaken, unattractive or even despicable —but nondiscriminatory—reasons will shield an employer from liability under Title VII, so long as the employer articulates them and the trier of fact finds them credible.[13] See, *e.g.*, *Pollard* v. *Rea Magnet*

[13] Some courts have suggested that an employer might dissemble about its motivations in a Title VII action because its real reasons for acting, while not prohibited by Title VII, would cause it embarrassment—or predicate legal liability—in some other context. See, *e.g.*, *Shager* v. *Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990); *Pollard* v. *Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977 (1987). That is an unremarkable consequence of being involved in legal proceedings. The employer may of course choose to remain silent in the Title VII action, preferring to run the risk of unwarranted liability in that context rather than exposing itself to some other and presumably greater cost; but there is nothing unreasonable about forcing that choice, once the

Wire Co., 824 F.2d 557, 559 (7th Cir.) (employer's belief that plaintiff had lied about being injured was mistaken, but not pretextual), cert. denied, 484 U.S. 977 (1987); *Nix* v. *WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (mistaken belief that employee had broken a rule not pretextual).

By contrast, the approach taken by the district court in this case places an unreasonable burden on Title VII plaintiffs. By ruling against respondent despite finding that he had proved that all of his former employer's stated reasons for demoting and discharging him were pretextual, the district court effectively required him either to produce direct evidence of discriminatory motive, or to rebut all

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plaintiff has proved what he is required to prove in order to raise a legally mandatory inference of discrimination. See Lanctot, *supra*, 43 Hastings L.J. at 136-140. If, on the other hand, the employer produces truthful evidence of its motivations and thereby avoids liability in a Title VII action, it can hardly complain about the possible collateral consequences of having told the truth—particularly if the evidence reveals, for example, some separate illegality, or violation of a contractual obligation. See *id.* at 138. Such a predicament is little different from, for example, that of a litigant who must choose between bearing his burden of proof in a civil proceeding and invoking his Fifth Amendment privilege to remain silent because of possible collateral criminal consequences. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 759 (1983) ("a dilemma demanding a choice between complete silence and presenting a defense [in a civil case] has never been thought an invasion of the privilege against compelled self incrimination" (emphasis omitted)) (quoting *Williams* v. *Florida*, 399 U.S. 78, 84 (1970)). Cf. *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986) (defendant has no "right" to use false evidence).

possible unarticulated reasons for petitioners' actions. Requiring a plaintiff to prove the negative of each and every possible motivation that the employer *might* have had, rather than focusing on the reasons that the employer has advanced, would deprive the plaintiff of the "full and fair opportunity to demonstrate pretext" emphasized by this Court in *Burdine*, 450 U.S. at 256-258, and make a mockery of the "sensible, orderly way to evaluate the evidence" otherwise established by this Court's cases. *Furnco*, 438 U.S. at 577.

C. There Is No Evidence On The Record In This Case Of A Nondiscriminatory Motive That Was Not Articulated By Petitioners

Petitioners argue (Pet. Br. 16-17, 22-24) that judgment for the plaintiff is not compelled upon a showing of pretext if other reasons, not articulated by the employer, are somehow "suggested by the employer's evidence" or, alternatively, "emerge during the employee's case." Pet. Br. 16. As to the first suggestion, for the reasons discussed in Part B we find little merit in the notion that an employer should have some right to ask a court or jury to speculate about possible permissible motivations that it is unable or unwilling to articulate. This Court in *Aikens* summarized the factfinder's job as being to "decide which party's explanation of the employer's motivation it believes," 460 U.S. at 716, not to range freely over the record in search of hidden justifications advanced by neither side.[14]

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[14] Any such rule would also be substantially less manageable in the context of cases tried to a jury, rather than to a court. Under such a regime, a court would at least be required to

As to alternative explanations effectively raised by the plaintiff himself, petitioners correctly note that several lower courts, including the Eighth Circuit, have held that a trial court is not compelled to find discriminatory intent, even after a showing that an employer's stated reasons are false, in cases in which additional reasons for the adverse employment action are raised by the plaintiff and remain unrebutted at the close of trial.[15] We agree that such cases present

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articulate for itself what it believed to be the real explanation for the employer's conduct, and support its position with specific evidence from the record. Review of a jury verdict for the defendant, on the other hand, would presumably involve the question whether any rational jury could have found that *any* unspecified nondiscriminatory explanation for the employer's conduct was fairly "suggested" by the record. Aside from insulating many verdicts for the defendant from effective review, such a standard would involve trial judges and appellate courts in yet another round of speculation—this time, twice removed from the reasons and evidence actually advanced at trial by the one party in the best position to know and be able to disclose the truth: the employer.

[15] See, *e.g.*, *Galbraith* v. *Northern Telecom, Inc.*, 944 F.2d 275, 283 (6th Cir. 1991) (articulated reason clearly pretextual, but no discrimination where complaint alleged plaintiff was fired because of continued relationship with individual who shot her on company property), cert. denied, 112 S. Ct. 1497 (1992); *Visser* v. *Packer Engineering Assocs.*, 924 F.2d 655, 657 (7th Cir. 1991) (en banc) (plaintiff's evidence of pretext proved action really taken for different but nondiscriminatory reason); *Maguire* v. *Marquette University*, 814 F.2d 1213 (7th Cir. 1987) (pendent claim alleged action taken for nondiscriminatory reason); *Burger* v. *McGilley Memorial Chapels, Inc.*, 856 F.2d 1046, 1047-1048, 1051 & n.9 (8th Cir. 1988) (plaintiff's evidence of pretext included letters from firing official demonstrating different but nondiscriminatory reasons).

a significantly different issue from that presented here, because a plaintiff who asserts or proves a nondiscriminatory reason, even if unstated by the defendant, effectively undermines his own case. Moreover, under those circumstances the plaintiff cannot convincingly argue that he did not have an adequate opportunity to rebut evidence that he himself has offered. Petitioners' contention to the contrary notwithstanding, however, this is not such a case.

Petitioners state that "the district court found that [respondent] introduced through his own testimony evidence of personal animosity his immediate supervisor had toward him," and that the "court made the credibility determination that the supervisor's personal animosity was the truthful explanation for the employment decision." Pet. Br. 11; see also *id.* at 22-24. That characterization of the record and the district court's decision is inaccurate.

First, it is not entirely clear that the district court found as a fact that respondent's demotion and discharge were motivated by personal animosity. The court stated only (i) that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated," and (ii) that while respondent had demonstrated that he was treated more harshly than others, "[i]t is not clear * * * that [respondent's] race was the motivation for the harsh discipline." Pet. App. A27. Although the first statement does suggest, as the court of appeals inferred (*id.* at A10), that the district court believed that the prison administration was motivated by personal animosity toward respondent, the court

pointed to no evidence introduced by either party that would support that proposition. Thus, a fair reading of the district court's decision reveals either a wholly unsupported factual finding, or merely a holding that there was insufficient evidence of racial motivation beyond respondent's prima facie case and his further showing of pretext. As the court of appeals held, the first possibility would represent a clearly erroneous factual "assumption"; the second is legally unsound under *McDonnell Douglas*, *Burdine*, and *Aikens*. Pet. App. A10.

Second, petitioners rely entirely on evidence indicating that respondent's immediate supervisor, John Powell, demonstrated hostility toward respondent at the time of the confrontation that led to his discharge. See Pet. Br. 22-24. Even persuasive evidence that Powell was "personally" hostile to respondent would of course be far from conclusive with respect to the liability of petitioners in this case, because the final decisions regarding discipline for respondent were made by petitioners, and not by Powell.[16] See Pet. App. A17 n.6. In any event, the evidence that petitioners now cite as disclosing an unarticulated nondiscriminatory motive for their treatment of respondent establishes no such thing. There is no question that Powell was hostile to respondent; the question is *why*. The evidence cited

[16] We note that, if anything, the record would appear to refute the suggestion that Powell was "personally" hostile to respondent. When asked on cross-examination whether there had been "difficulties" between the two, Powell responded: "I can't say that there was difficulties between he and I. At no time was there any kind of personal—." The response was cut off by a further question. J.A. 46; Tr. 2-88.

by petitioners does nothing to dispel the proper inference, based on the circumstances, on respondent's establishment of his prima facie case, and on petitioners' fabricated explanation, that the real reason was respondent's race. See, *e.g.*, *Burdine*, 450 U.S. at 255 n.10.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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